D.B. CIVIL SPECIAL APPEAL(W)NO.710/2007

Brij Mohan
Vs.
The Civil Judge(J.D.), Chirawa & Ors.

DATE OF ORDER :: 28-05-2007

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Shri Sunil Kumar Singodiya, for the appellant.

This special appeal is directed against the order of the learned Single Judge dismissing the writ petition of the appellant. The appellant had filed the writ petition challenging the order by which his application for impleadment in terms of Order 1 rule 10 of the Code of Civil Procedure was rejected.

Order 1 rule 10(2) of the Code provides that the Court may at any stage of the proceedings, either upon or without the application of either party, add any person who ought to have been joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit.

In the instant case the suit was filed in 1995. In course of time it was decreed ex parte in 2006 but on application of the defendant, has been restored to its original file. At this stage appellant

filed application for impleadment as a defendant. The case of the appellant is that in his statement the defendant specifically stated about non-joinder of the appellant, and in view of the pleading an issue has also been framed to the effect whether the defendant is a necessary party and in his absence decree can be passed or not. The appellant is therefore a necessary party.

It is well settled that the choice of parties rests with the plaintiff, subject to provisions of Order 1 rule 10(2). It goes without saying that if ultimately, on evidence, it transpires that the suit is bad for non-joinder of parties, no relief may be granted and suit may be dismissed. Indeed, as mentioned above, in the instant case, an issue to that effect has already been framed. The point is whether in view of the stand of the defendant, the appellant should be impleaded as a defendant. The defendant can no doubt raise objection as to non-joinder or mis-joinder of parties but he cannot have choice of parties.

It was submitted that defendant had pleaded no instruction leading to ex parte decree. We are not impressed by the submission, for, at the instance of the defendant himself, the ex parte decree was later set aside. Order 1 rule 10(2) contemplates addition of a person whose presence may be necessary for effectual and complete adjudication upon “all the

questions involved in the suit”. The appellant cannot thrust himself as a co-defendant against the wishes of the plaintiff. As already observed above, if his presence is found to be vital to the adjudication, the suit may be dismissed for non-joinder of the party. We find no error in the order of the trial court rejecting the application.

The appeal is dismissed.

[MOHAMMAD RAFIQ],J. **[S.N.JHA],CJ.**

Praveen